RECORD AND BRIEFS

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No. 16-712

IN THE

Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC,

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 ("AIA"), Congress created *inter partes* review, an adversarial administrative proceeding in which the U.S. Patent and Trademark Office may reconsider the patentability of the claims in an issued patent. *See* 35 U.S.C. 311 *et seq.* The questions presented are:

1. Whether *inter partes* review violates Article III or the Seventh Amendment by authorizing an Executive Branch agency, rather than a court or jury, to invalidate a previously issued patent.

2. Whether the PTO's rules governing motions to amend and its interpretations of such rules are permissible under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and its progeny.

3. Whether the PTO's interpretation of "second lockdown mechanism" was reasonable in light of the claims and specification.

RULE 29.6 STATEMENT

Greene's Energy Group, LLC ("Respondent") is an independent, privately held company. Greene's Energy Group, LLC has no parent corporation. No publicly held company owns 10% or more of Greene's Energy Group, LLC's stock.

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OPINIONS BELOW

The order denying panel rehearing and rehearing *en banc* (App., 37-38) is unreported. The panel order disposing of the case without opinion (App., 1-2) is unreported and available at 639 F. App'x 639 (Fed. Cir. May 4, 2016). The opinion and order of the Patent Trial and Appeal Board (App., 3-36) is unreported and available at 2015 WL 2089371 (PTAB May 1, 2015).

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on May 4, 2016. The Federal Circuit denied Petitioner's request for rehearing *en banc* on July 26, 2016. On October 14, 2016, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to and including November 23, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

First, in arguing that *inter partes* review is unconstitutional, Petitioner attempts to overturn settled case law finding patents to be mere "public rights." In doing so, Petitioner rehashes the petition for writ of certiorari filed in *MCM Portfolio LLC v. Hewlett-Packard Co.*, docket No. 15-1330, which was denied Oct. 11, 2015. Petitioner offers no meaningful explanation why its case is any different from that of the petitioner in *MCM Portfolio*.

Second, Petitioner's argument that the denial of its motion to amend violates the APA raises issues not presented to the Federal Circuit, and does not apply the proper analysis. While Petitioner offers a litany of arguments that the PTO's rules governing motions to amend claims during *inter partes* review violate the

Administrative Procedure Act ("APA"), most of these arguments were never presented to the Federal Circuit (this Court should decline to review them as a matter of first impression) and Petitioner never attempts to apply the *Chevron* analysis. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Moreover, under the *Chevron* analysis, the PTO's rules are reasonable and its interpretation of them is not plainly erroneous.

Third, Petitioner attempts to save its own patent by pressing its incorrect interpretation of the PTO's final written decision. Petitioner argues that "it is unclear if traditional principles of claim construction . . . apply under a patent's broadest reasonable interpretation." Pet. at 4. Petitioner is wrong; the Federal Circuit has been clear that they do apply. Instead, what Petitioner steadfastly refuses to concede is that when claim construction principles are properly applied, as the PTO did, its proposed claim constructions are untenable.

REASONS FOR DENYING THE WRIT

The Court of Appeals for the Federal Circuit's affirmance of the PTO's decision under Federal Circuit Rule 36 is appropriate as it was entered without an error of law.

I. *INTER PARTES* REVIEW VIOLATES NEITHER THE SEVENTH AMENDMENT NOR ARTICLE III

The Federal Circuit's opinion in *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 292,[1] correctly held that neither

[1] In offering an explanation why the *per curiam* affirmance of the PTO's decision does not preclude this Court's review,

Article III nor the Seventh Amendment bars the PTO from conducting *inter partes* review of patents that the PTO has issued. That holding does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

A. The Seventh Amendment is Only Implicated if the Issue Must be Adjudicated by an Article III Court

While Petitioner first argues that *inter partes* review violates the Seventh Amendment before reaching the Article III issue, this gets the inquiry backward. Rather, if an administrative adjudicative scheme comports with Article III, the Seventh Amendment "poses no independent bar." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989). In other words, only where Article III compels Congress to assign adjudication of particular claims to federal courts, or where Congress chooses to do so, does the Seventh Amendment guarantee the parties "a right to a jury trial whenever the cause of action is legal in nature." *Id.* at 53.

The Seventh Amendment provides in pertinent part that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII. The Seventh Amendment guarantees the right to a jury trial only of those claims that are adjudicated in Article III courts. Thus, "if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a

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Petitioner asserts that "the lack of a published opinion is no barrier to review given that the Federal Circuit has already issued a published opinion in *MCM Portfolio* thoroughly discussing the issue." This explanation highlights why this petition for writ of certiorari, like the one in *MCM Portfolio*, should be denied.

jury trial whenever the cause of action is legal in nature." *Granfinanciera*, 492 U.S. at 53. In contrast, if Congress has permissibly assigned "the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Id.* at 53-54; *see id.* at 55 n.10 ("Congress may decline to provide jury trials" where the action involves "statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency"); *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) ("[T]he Seventh Amendment is not applicable to administrative proceedings"); *Atlas Roofing Co. v. Occupational Safety & Health Comm'n*, 430 U.S. 442, 455 (1977) ("[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment []"); *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974).

This Court's decision in *Pernell*, illustrates that principle. *Pernell* involved a Seventh Amendment challenge to a statute that established a cause of action for parties to recover certain real property through a judicial proceeding. This Court held that the Seventh Amendment entitled the parties to a jury trial because the statute "encompasses rights and remedies which were enforced, at common law, through trial by jury." *Id.* at 381. The Court recognized, however, that "the Seventh Amendment would not be a bar to" entrusting those same disputes "to an administrative agency" rather than a court. *Id.* at 383. Only because "Congress ha[d] not seen fit to do so," but rather had provided that the disputes would "be brought as ordinary civil actions," was Congress

required to "preserve to parties their right to a jury trial." *Id.*; *see Atlas Roofing*, 430 U.S. at 455 (the Seventh Amendment does not prevent Congress "from committing some new types of litigation to administrative agencies with special competence in the relevant field [] even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law").

The decisions on which Petitioner relies (Pet. at 12-19) are inapposite. For example, *Granfinanciera* held that Article III barred Congress from assigning certain fraudulent-conveyance claims to non-Article III bankruptcy courts. 492 U.S. at 55. Because the Constitution required those claims to be adjudicated in Article III courts, and because the claims were legal in nature, the jury-trial right applied. *Id.* at 48-49. *Curtis v. Loether*, 415 U.S. 189 (1974), involved a cause of action that Congress had assigned to "the ordinary courts of law" rather than to an administrative tribunal. *Id.* at 194. Because that cause of action assigned to the courts was "an action to enforce 'legal rights' within the meaning of [the Court's] Seventh Amendment decisions," the jury-trial right applied. *Id.* at 195; *accord Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342 (1998) (holding that when Congress assigned copyright cases to courts rather than to an agency, the Seventh Amendment provided "a right to a jury determination of the amount of statutory damages"). None of those decisions suggest that the Seventh Amendment prevents Congress from assigning disputes involving public rights to administrative agencies for adjudication without a jury.

Inter partes review would not violate the Seventh Amendment even if, as Petitioner suggests (Pet. at 11),

the application of the jury trial right to patent claims depends solely on whether the claims at issue were historically tried before juries. *Inter partes* review provides no right to monetary damages, but affords only the equitable relief of cancellation of a patent. Claims for annulment or cancellation of a patent—as distinct from claims of patent infringement—were traditionally brought before courts of equity, not resolved by juries. *See Mowry v. Whitney*, 81 U.S. (14 Wall.) 434, 440 (1872) (explaining, prior to the existence of administrative avenues for patent reconsideration, that "the appropriate tribunal for the annulling of a grant or patent from the government" is "the chancery jurisdiction and its mode of proceeding"); Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 Va. L. Rev. 1673, 1684 (2013) ("[I]n England in the eighteenth century, only chancery courts had the power to revoke a patent upon request of a private citizen."). Accordingly, common law history reinforces that the Seventh Amendment does not require such claims to be tried before juries.

B. Because Patents are a Quintessential "Public Right," *Inter Partes* Review Does Not Violate Article III

Article III provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. "[I]n general," this provision prevents Congress from withdrawing from Article III courts any matter involving the exercise of judicial power. *Stern v. Marshall*, 564 U.S. 462, 484 (2011). However, one exception to this general rule is that Congress may designate "public rights" for adjudication in non-Article III tribunals. *See, e.g., Murray's Lessee v.*

Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985).

Most critically, "what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." *Stern*, 564 U.S. at 490-491. Where Congress has acted "for a valid legislative purpose pursuant to its constitutional powers under Article I," it may delegate even a "seemingly private right" to non-Article III courts if the right "is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution." *Granfinanciera*, 492 U.S. at 54 (citation omitted). The federal government need not be a party to the agency adjudication. A dispute between private parties may implicate public rights if "the claim at issue derives from a federal regulatory scheme," or if "resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority." *Stern*, 564 U.S. at 490.

Patents are quintessential public rights. Pursuant to its constitutional authority to "promote the Progress of Science and useful Arts" by establishing a patent system, U.S. Const. Art. I, § 8, Cl. 8, Congress created the PTO—an agency with "special expertise in evaluating patent applications." *Kappos v. Hyatt*, 132 S. Ct. 1690, 1700 (2012). It directed that agency to issue a patent if "it appears that the applicant is entitled to a patent" under standards set by federal law, 35 U.S.C. § 131. Patents accordingly confer rights that "exist only by virtue of statute." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 n.5 (1964).

The *inter partes* review procedure is the sort of mechanism that Congress may permissibly create to

administer a public-right scheme. The PTO is responsible in the first instance for allocating patent rights in accordance with federal law. Procedures for reviewing patents to ensure that they were properly issued are "closely integrated" into the "public regulatory scheme" of patent issuance, and therefore are "a matter appropriate for agency resolution." *Granfinanciera*, 492 U.S. at 54 (citation omitted). The "basic purpose[]" *of inter partes* review is simply "to reexamine an earlier agency decision" to grant a patent right. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016). A procedure that gives the expert agency charged with allocating patent rights "a second look at an earlier administrative grant of a patent," *id.*, is "integrally related" to the public-right scheme of patent issuance, *Stern*, 564 U.S. at 49.

In *MCM Portfolio*, the Federal Circuit correctly recognized these principles, explaining that the patent right "derives from an extensive federal regulatory scheme," and that Congress "saw powerful reasons to utilize the expertise of the PTO for an important public purpose - to correct the agency's own errors in issuing patents in the first place." 812 F.3d at 1290. The court observed that "patent rights are public rights" whose validity is "susceptible to review by an administrative agency." *Id.* at 1293. The court concluded that the "teachings of the Supreme Court in *Thomas, Schor,* and *Stern* compel the conclusion that assigning review of patent validity to the PTO is consistent with Article III." *Id.* at 1291.

Petitioner primarily argues that patent rights may be adjudicated only in Article III courts because "[a] patent has been recognized for centuries as a private property right, so patent infringement cases do not rely on congressional grace for an Article III court."

Pet. at 18. That is incorrect. Unlike private property rights, patent rights "exist only by virtue of statute," *Sears*, 376 U.S. at 229 n.5 (citation omitted). "The [patent] monopoly did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated by the rules of the common law." *Gayler v. Wilder*, 51 U.S. (10 How.) 477, 494 (1851). Accordingly, the patent monopoly "is created by the act of Congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes." *Id.*; *see Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 36 (1923) (in issuing a patent, "[t]he government is not granting the common law right to make, use and vend" an invention, but rather is granting the statutory right to exclude others from the invention).

English practice was the same. Patents in England were administered pursuant to the Statute of Monopolies, a law enacted in 1623 in response "to abuses whereby the Crown would issue letters patent, 'granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public.'" *Bilski v. Kappos*, 561 U.S. 593, 627 (2010) (quoting *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966)). The Statute of Monopolies "generally prohibited the Crown from granting" monopoly rights, but "permitted grants of exclusive rights to the 'working or making of any manner of new Manufactures.'" *Id.* (quoting 1623, 21 & 22 Jac, c. 3, § VI (Eng.), *reprinted in* 4 Statutes of the Realm 1213 (1963)).

Even if Article III limited agency adjudication of statutory actions that are related to those that were traditionally tried in courts of law, Article III would pose no impediment to *inter partes* review because actions seeking annulment or cancellation of patents—

in contrast to infringement actions—were decided by courts of equity. *See Mowry*, 81 U.S. (14 Wall.) at 440; Lemley, 99 VA. L. REV. at 1684.

This Court's decision in *Stern* does not suggest otherwise. *Stern* addressed a claim that arose "under state common law," which was not a public right because "Congress has nothing to do with it." 546 U.S. at 493. Indeed, *Stern* reinforced the same "public rights" concept that drove the *Patlex* and *Joy* decisions. *See Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985); *Joy Techs., Inc. v. Manbeck*, 959 F.2d 226, 228 (Fed. Cir. 1992). In *Stern*, this Court confirmed two circumstances in which agencies may adjudicate "public rights" claims between two private parties: (1) where the claim derives from a federal regulatory scheme, and (2) where resolution of the claim by an expert governmental agency is deemed essential to a limited regulatory objective within the agency's authority. *Id.* at 490.

Inter partes reviews, like reexaminations, fit squarely within both circumstances. First, patent rights exist only by virtue of a federal statutory scheme. *See, e.g., Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657-58 (1834) (rejecting the notion that an inventor enjoys any *common-law* property right to a patent monopoly). Pursuant to 35 U.S.C. § 131, the PTO grants patents based on the standards in federal statutes, such as 35 U.S.C. §§ 101 (patent eligibility), 102 (novelty), and 103 (non-obviousness). Second, patent validity falls within the technical expertise of the PTO, the same agency that examines patent applications in the first place. And post-grant proceedings, such as *inter partes* review, are essential to the limited regulatory objective within the PTO's authority: to ensure that

only proper patents are issued and to correct mistakes made in wrongly issuing patents.

That conclusion does not change even if, as Petitioner urges (Pet. at 12-13), *inter partes* review is compared to the English writ of *scire facias*, by which a party could ask a court to revoke a patent that had been "issued without authority" and that should be repealed "for the good of the public and right and justice." *Mowry*, 81 U.S. at 440. The Federal Circuit has found that analogy inapt, holding that a "proceeding on a writ of *scire facias* [i]s not analogous to a suit for a declaration of invalidity, but [i]s more akin to an action for inequitable conduct." *In re Technology Licensing Corp.*, 423 F.3d 1286, 1290 (Fed. Cir. 2005). Even if *scire facias* provided a useful analogy to *inter partes* review, however, "[t]he *scire facias* to repeal a patent was brought in chancery" rather than in law. *Mowry*, 81 U.S. at 440. Although subsidiary questions of fact in *scire facias* actions were sometimes delegated to juries, the ultimate question whether a patent had been improperly issued "stated no fact which could be tried by a jury." Lemley, 99 Va. L. Rev. at 1688 (quoting *Rex v. Arkwright*, (1785) 1 CPC 53 (K.B.) 61, *reported in* 1 Thomas Walter Williams, *An Abridgment of Cases Argued and Determined in Courts of Law, During the Reign of His Present Majesty, King George The Third* 93 (1798)).

Petitioner also suggests (Pet. at 19) that this Court's decision in *United States v. American Bell Telephone Co.*, 128 U.S. 315, 364 (1888), holds that patent rights must be adjudicated in Article III courts. However, *American Bell* held only that the Patent Act in its then-current form provided no basis for cancelling an original patent based on the rejection of a later reissue application. *See American Bell*, 128 U.S. at 364

(Patent Act in its then-current form did not authorize the Executive Branch to cancel a previously issued patent). *American Bell* merely reflects the fact that, in the 19th century, Congress had not authorized the Patent Office or any other administrative body to reconsider the validity of previously issued patents.

C. There is No Dispute Among Lower Courts

While some of the procedures of *inter partes* review are new, the purpose of *inter partes* review—correcting PTO errors in issued patents—is not new. Congress first gave the PTO such authority in 1980, when it created *ex parte* reexaminations. *See* Act of Dec. 12, 1980, Pub. L. No. 96-517, § 1, 94 Stat. 3015. That statute allows the PTO, upon a request by a third-party petitioner or by the patentee itself, to review claims of an issued patent to reconsider whether those claims should have been granted. *See* 35 U.S.C. §§ 302, 303(a). A third-party petitioner does not participate in an *ex parte* reexamination proceeding after the initial request. *See id.* § 305. In 1999, Congress expanded reexaminations to offer an *inter partes* procedure, so that petitioners could participate throughout the process. *See* Optional *Inter Partes* Reexamination Procedure Act of 1999, Pub. L. No. 106-113, Tit. IV, Subtit. F, 113 Stat. 1501A-567 to -572 (35 U.S.C. § 311 *et seq.* (2000)). *Inter partes* review replaced the latter procedure.

No judicial decision casts any doubt on either form of reexamination. To the contrary, in 1985, the Federal Circuit held that *ex parte* reexaminations did not run afoul of either Article III or the Seventh Amendment. *Patlex*, 758 F.2d at 604. The Federal Circuit observed that the reexamination statute was enacted to correct errors made by the government in issuing patents that

should never have been granted. *Id.* The Federal Circuit recognized that, even though patent validity is often litigated in disputes involving private parties, the threshold question of validity turns on whether the PTO properly granted the patent—an issue concerning public rights, not private rights. *Id.*

In 1992, the Federal Circuit again upheld the constitutionality of the reexamination statute. *Joy,* 959 F.2d at 228. The Federal Circuit considered this Court's post-*Patlex* decision in *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989), which involved the right to jury trial under the Seventh Amendment for a bankruptcy trustee's claim for recovering a fraudulent conveyance. The Federal Circuit held that *Granfinanciera* had affirmed the basic underpinnings of *Patlex*—cases involving public rights, including patent validity, can be adjudicated by administrative agencies without implicating the Seventh Amendment. 959 F.2d at 228.

The patentee in *Joy Technologies* asked this Court to review essentially the same questions Petitioner advances today. This Court denied certiorari. 506 U.S. 829 (1992).

In 2011, Congress replaced *inter partes* reexamination and authorized the PTO to review issued patents in *inter partes* review, as well as other post-grant administrative proceedings. Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, § 6(a), 125 Stat. 299-304 (35 U.S.C. § 311 *et seq.*); *see also id.* §§ 6(d), 18, 125 Stat. 305-11, 329-31. As this Court recently noted, *inter partes* review carries out the same purpose as reexaminations: "to reexamine an earlier agency decision." *Cuozzo,* 136 S. Ct. at 2144. *Inter partes* review therefore are no less proper an exercise of administrative authority–both involve public rights–and congressional sponsors explained *inter partes*

review's constitutionality by reference to those earlier procedures. *See* 157 Cong. Rec. S5374-76 (daily ed. Sept. 7, 2011) (letter from Hon. Michael W. McConnell, submitted by Sen. Kyl); *see also Cooper v. Lee,* 86 F. Supp. 3d 480, 488 (E.D. Va. 2015) (summarizing similarities between reexaminations and IPRs for the purpose of constitutional analysis), *aff'd summarily,* No. 15-1483 (Fed. Cir. Jan. 14, 2016), *cert. denied*, 137 S. Ct. 291 (2016).

For constitutional purposes, therefore, *inter partes* review presents no new issue. Although Petitioner argues that "*inter partes* review is qualitatively different than a reexamination proceeding" (Pet. 17-18, n.6.), Petitioner never explains how this "qualitative[] differen[ce]" makes *inter partes* review uniquely unconstitutional in its view. Rather, Petitioner's argument—taken to its logical conclusion—would deprive the PTO of *any* power to reexamine an issued patent without the patentee's consent, not even on the PTO's own initiative in a proceeding to which only the government and the patentee are parties. Petitioner's argument fails for the same reason that objections to reexamination failed: patent validity involves public rights, and the PTO can review patent validity without violating Article III or the Seventh Amendment once Congress confers the necessary statutory authority, as it has here.

In short, the Federal Circuit has repeatedly and correctly rejected the argument that the Constitution prohibits the PTO from correcting its own error in issuing a patent that fails the statutory requirements.

II. PETITIONER RAISES NO REASON WHY THIS COURT SHOULD REVIEW THE PTO'S[2] DENIAL OF THE MOTION TO AMEND

A. By Not Raising Several of its Arguments Before the Federal Circuit, Petitioner Failed to Preserve Its Right to Challenge the Denial of the Motion to Amend

Petitioner is improperly asking this Court to review issues that were not raised before the Federal Circuit. While it did challenge the PTO's finding that it failed to provide adequate written description support for the proposed amended claims, Petitioner's Federal Circuit briefing does not raise any other issue with the denial of the motion to amend that is also raised in its petition. Nowhere in its Federal Circuit appeal brief or request for rehearing does Petitioner challenge the PTO's decision on the grounds that: the PTO "*sua sponte* refused the proposed amendments because . . . they were not adequately explained and included undefined terms" (Pet. at 22); the PTO's rule that the patentee bears the burden of persuasion in demonstrating the patentability of the proposed amended claims is an incorrect interpretation of 35 U.S.C. § 316(e) (*id.* at 22-23); or the "broadest reasonable interpretation" standard is not the proper claim construction standard for a motion to amend (*id.* at 24-25). Because these issues were not raised to the Federal Circuit, this Court should decline to review them now. *See Virtue v. Creamery Package Mfg. Co.*,

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[2] *Inter partes* reviews are conducted by the Patent Trial and Appeal Board, which is an adjudicatory tribunal of the PTO. 35 U.S.C. § 6.

227 U.S. 8, 38-39 (1913) (refusing to consider arguments not raised before the circuit court).

Indeed, because new issues should not be reviewed by this Court, Petitioner has waived its right to challenge the denial of the motion to amend. The PTO's decision provided two independent grounds why the motion to amend should be denied: (1) Petitioner failed to provide adequate written description support for the proposed amended claims (App., 33-34) and (2) Petitioner failed to articulate definitions for two terms, "setting tool" and "wellhead assembly" (App., 35-36). In other words, Petitioner failed to preserve its challenge to the second of these grounds, i.e., none of the issues raised in its petition that were also raised in its Federal Circuit briefing could justify overturning the PTO's finding that the motion to amend should be denied because Petitioner failed to articulate definitions for certain claim terms. Therefore, for this reason alone, this Court should decline to review Petitioner's challenge to the PTO's rules governing the motion to amend process.

B. This Court Should Decline Review Because Petitioner Does Not Apply the *Chevron* Analysis

When a statute expressly grants an agency rulemaking authority, and does not "unambiguously direct" the agency to adopt a particular rule, the agency may "enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Cuozzo*, 136 S. Ct. at 2142. Regulations issued by the PTO under a statutory grant of rulemaking authority are entitled to *Chevron* deference unless they are based on an unreasonable construction of the statute.

The PTO's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). Under the APA, courts "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *Arnold P'ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004). In other words, "[w]hen an agency interprets its own regulation, the Court, as a general rule, defers to it "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) (quoting *Auer*, 519 U.S., at 461).

The PTO properly exercised its authority to implement the *inter partes* review statute and provide a framework for the agency's administration of the amendment process. Under *Chevron*, an agency's interpretation of a statute is entitled to deference where Congress has delegated authority to the agency to interpret the statute and the agency acts through formal administrative procedures. 467 U.S. at 844-46; *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (*Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law"). That is, the application of *Chevron* deference turns on Congress's intent—manifested in this case by an affirmative grant of authority that is particular to motions to amend.

There is no question that Congress delegated authority to the PTO to make rules carrying the force of law in administering the *inter partes* review statute. *See Cuozzo*, 136 S. Ct. at 2142 (in applying the

Chevron analysis to the AIA, noting that "the statute allows the Patent Office to issue rules governing *inter partes* review") (citation omitted). Petitioner fails to even mention this precedent, but instead argues that its own interpretation of the rules should apply. It then compounds this error by trying to show that its reading of the statute and regulations is correct, instead of showing that the agency's interpretation is unreasonable or plainly erroneous. As shown below, the PTO's interpretation of the statute and regulations is entitled to *Chevron* deference.

C. The PTO's Order Requiring Petitioner to "Explain" How the Specification Supports the Proposed Amended Claims is Not a Plainly Erroneous Interpretation of 37 C.F.R. § 42.121(b)(1)

Petitioner argues that requiring the patentee to explain how the specification provides written support for proposed amendment claims violates the APA because the PTO went beyond the regulations. Pet. at 21. Prior to submitting its motion to amend, on August 15, 2014, the PTO ordered Petitioner to explain how the specification of the U.S. Patent 6,179,053 (the "'053 patent") supports the proposed amended claims:

> Pursuant to 37 C.F.R. § 42.121(b)(1), Patent Owner must set forth the support in the original disclosure of the patent for each proposed substitute claim, i.e., Patent Owner must identify clearly the written description support in the disclosure corresponding to the earliest date upon which Patent Owner seeks to rely.

> Merely indicating where each claim limitation individually is described in the original disclosure may be insufficient to demonstrate support for the claimed subject matter as a whole. . . . [I]f the claim language does not appear in the same words in the original disclosure, a mere citation to the original disclosure, without any explanation as to why a person of ordinary skill in the art would have recognized that the inventor possessed the claimed subject matter as a whole, may be inadequate.

Greene's Energy, LLC v. Oil States Energy Servs., LLC, IPR2014-00216, Paper No. 18 at 4 (PTAB Aug. 15, 2014). Despite this order, Petitioner's motion to amend only includes a chart that provides cites—with absolutely no explanation—for the portions of the written description that it alleges support its proposed amended claims. App., 33-34. Unsurprisingly, the PTO found that Petitioner did "not satisf[y] its burden of showing written description support for the proposed substitute claims." *Id.* at 34.

Petitioner argues that the PTO's interpretation of 37 C.F.R. § 42.121(b)(1) violates the APA because it purportedly "go[es] outside of the regulation." Pet. at 21. However, in doing so, Petitioner offers no explanation why the PTO's order and subsequent decision is "plainly erroneous or inconsistent with the regulation." *See Auer*, 519 U.S. at 461. Indeed, the PTO's interpretation appears to be the type of agency interpretation that is routinely upheld. *See id.* ("A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.");

Decker, 133 S. Ct. at 1337 ("The EPA's interpretation is a permissible one. Taken together, the regulation's references to 'facilities,' 'establishments,' 'manufacturing,' 'processing,' and an 'industrial plant' leave open the rational interpretation that the regulation extends only to traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities.").

D. Petitioner's "*Sua Sponte*" Argument is Wrong in Its Interpretation of Both the Law and Facts

1. Because the Burden of Proof Lies with the Patentee in Amending the Claims, the PTO Can Raise Issues *Sua Sponte*

As discussed *infra*, because a patentee properly bears the burden of persuasion in demonstrating the patentability of a proposed amended claim, the PTO currently only makes a determination of whether or not the patentee has met that burden when deciding the motion to amend. However, given the PTO's broad authority to set procedures for *inter partes* review, and with its tribunal presiding over a litigation-like proceeding, the PTO could adopt rules allowing the PTO to *sua sponte* raise a proposition of unpatentability regarding an amended claim in order to further *inter partes* review's goal of keeping patents "within their legitimate scope." *Cuozzo*, 136 S. Ct. at 2144; *see also Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1307-08 (Fed. Cir. 2015) (describing the need for scrutiny of "substitute claims" that a "petitioner may choose not to challenge").

2. The PTO Did Not Act *Sua Sponte*

First, as discussed *infra*, Petitioner was put on notice by the PTO's August 15, 2014 order that "[m]erely indicating where each claim limitation individually is described in the original disclosure may be insufficient to demonstrate support for the claimed subject matter as a whole." *Greene's Energy*, IPR2014-00216, Paper No. 18 at 4. Thus, Petitioner cannot fairly argue that "there was no chance to explain [the written description support] to the Board because of its *sua sponte* action." Pet. at 22.

Second, Petitioner was informed multiple times that it needed to provide constructions for certain terms. The PTO's August 15, 2014 order further specifies that "Patent Owner should . . . come forward with technical facts and reasoning about those feature(s) or limitation(s), including the construction of new claim terms . . . ." *Greene's Energy*, IPR2014-00216, Paper No. 18 at 3. As Respondent's opposition explained, in detail, Petitioner's motion to amend failed to provide a construction for "setting tool," a term that has no specific meaning in the art. *See* App., 35. Meanwhile, it is reply brief in support of its motion to amend, Petitioner responded to Respondent's opposition merely by arguing that no construction was necessary because the claim language itself plainly sets out "the defining characteristics of the 'setting tool.'" *Id.* Accordingly, contrary to the petition, Petitioner did have a chance to provide constructions for the terms the PTO found lacked a definition, it simply chose not to.

E. The PTO's Rules Placing the Burden of Persuasion on Patentees to Prove That Proposed Amended Claims are Patentable is a Reasonable Interpretation of the AIA

1. The AIA's Express Grant of Rulemaking Authority for Motions to Amend Includes the Authority to Assign Burdens of Proof for Such Motions

Congress gave the PTO general authority to set standards and procedures implementing § 316(d), without further qualification or restriction. *See* 35 U.S.C. § 316(a)(9) (directing the PTO to "set[] forth standards and procedures for allowing the patentee to move to amend the patent under subsection (d)"). Section 316(a)(9) thus authorizes the PTO to establish not only the procedures, but also the relevant standards, for motions to amend. The PTO's designation of a burden of proof for motions to amend is plainly within the scope of § 316(a)(9)'s authorization to set standards and procedures for motions to amend. *See City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1871 (2013) (under *Chevron*, "the question in every case, is simply, whether the statutory text forecloses the agency's assertion of authority, or not").

Assigning the burden of proof in a proceeding falls under the auspices of setting forth a "standard or procedure" for that proceeding. A "standard of proof" is one of a number of common legal "standards"—it is "[t]he degree or level of proof demanded in a specific case." STANDARD OF PROOF, Black's Law Dictionary 1441 (8th ed. 2004). Courts and statutes thus consistently identify a law or regulation that defines the burden of proof in a proceeding as a subspecies of the

"standards or procedures" governing that proceeding. *See, e.g., United States v. Real Prop. In Section 9, Town 29 North, Range 1 of Charlton, W. Twp. Otsego Cnty., Michigan*, 241 F.3d 796, 798 (6th Cir. 2001) (describing legislation that "significantly alter[e]d the standards and procedures applicable to civil forfeiture proceedings" by "chang[ing] and rais[ing] the government's burden of proof"); Pub. L. No. 109-54 (2005), § 1005(e)(2)(A)(i) (limiting judicial review to the question "whether the status determination of the [agency] was consistent with the standards and procedures specified by the Secretary . . . including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence"); *Commonwealth v. Miller*, 585 Pa. 144, 148 (Pa. 2005) ("[c]onsistent with" the "need[] to develop standards and procedures," the lower court "held that the burden of proof in such cases was on the petitioner").

The PTO designated the burden of proof for motions to amend through regulation, the issuance of an informative decision, and subsequently in a precedential decision. *See Idle Free Sys., Inc. v. Bergstrom, Inc.*, 2013 WL 5947697 at *4 (PTAB June 11, 2013); *MasterImage 3D, Inc. v. RealD Inc.*, IPR2015–00040, 2015 WL 4383224 (PTAB July 15, 2015) (precedential), slip op. at 4. These decisions applied a rule governing who bears the burden of proof in all motions (§ 42.20) to a particular motion (a motion to amend under § 42.121), and represent the agency's authoritative construction of § 316(d) reached through a formal regulatory and adjudicative process. This construction is entitled to *Chevron* deference.

2. Statutory Text and Structure Confirm the Reasonableness of the PTO's Interpretation

Section 316(d) is titled "Amendment of the Patent." It authorizes a motion to amend and additional motions, and requires that a substitute claim not broaden the original claim's scope or add new matter. *See* 35 U.S.C. § 316(d). Section 316(a)(9) authorizes regulations implementing § 316(d), and further requires that information presented by the patentee in support of a substitute claim be included in the file history of the patent. *See* 35 U.S.C. § 316(a)(9). As the Federal Circuit has noted, § 316(a)(9) grants the PTO "the *specific* authority to establish the standards and procedures" for motions to amend. *Nike, Inc. v. Adidas AG*, 812 F.3d 1326, 1333 (Fed. Cir. 2016) (emphasis in original).

These two sections are the only sections of Chapter 35 that contain rules and limits that are expressly applied to the amendment process. This structure suggests that when Congress intended to apply a particular rule or limit to motions to amend, it said so in §§ 316(a)(9) and (d). It also suggests that other, generally stated requirements of the AIA that are not included in the "motions to amend" section of Chapter 35 or its implementing authority do not apply to motions to amend. *See Henderson v. Shinseki*, 562 U.S. 428, 439-40 (2011) (noting that the placement of a statutory provision outside the section expressly directed to a subject suggests that the provision is not within the scope of that subject); *see also Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008).

Section 316(e), by contrast, makes no reference to claim amendments or to § 316(d). It is only § 316(a)(9),

rather than § 316(e), that is expressly directed to motions to amend. The amendment-specific and comprehensive nature of §§ 316(a)(9) and (d) further confirms that those sections, rather than § 316(e), govern motions to amend. *See National Cable and Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("specific statutory language should control more general language when there is a conflict between the two"). Section 316(e)'s general nature, and its placement outside the subsections expressly directed to motions to amend, suggest that § 316(e) is not directed to motions to amend—and that the burden of proof is instead among those matters that the AIA left to the PTO's broad authority to establish "standards and procedures" for motions to amend.

Even if § 316(e) were deemed to at least presumptively apply in all phases of an *inter partes* review, it still would not apply where it has been affirmatively displaced. Thus, even a presumptively universal § 316(e) would not govern the institution phase of an *inter partes* review because § 314(a) assigns a different, lower burden to the petitioner during that part of the proceeding. And so, too, § 316(a)(9). That section does not mandate a particular type of burden of proof, but rather leaves it to the PTO to determine the appropriate standards and procedures for motions to amend. And again, Petitioner does not even attempt to fashion a colorable argument that setting a burden of proof for a proceeding constitutes anything other than setting a "standard" for that proceeding.

Conversely, if § 316(e) were intended to govern motions to amend, it would make little sense for § 316(a)(9) to authorize the PTO to establish "standards and procedures" for such motions—because § 316(e) would then largely dictate those standards and

procedures. If § 316(e) applies to substitute claims, the amendment process must consist of the following steps: (1) the patentee bears the burden of showing that the proposed amendments are non-broadening and have written support; (2) if this burden is met, the PTO must bring the amended claims into the proceeding "as a matter of course;" (3) the petitioner may then challenge the proposed amended claims per § 316(e); (4) if the petitioner declines to challenge the new claims, is no longer participating in the proceeding, or fails to bear its burden of proving that the proposed claims are unpatentable, the amended claims must be published in a certificate "as a matter of course;" and (5) if the PTO independently assesses the claims' patentability, the patentee must be afforded notice and an opportunity to respond.

If this is so, however, then there remains little role for § 316(a)(9)'s broad authorization for the PTO to set standards and procedures for substitute claims. In other places where § 316(a) grants general regulatory authority, but Congress wanted to prescribe some of the relevant standards or procedures, either the text of § 316(a) or the provision that § 316(a) implements spells out those restrictions. *See, e.g.*, § 316(a)(5) (authorizing standards and procedures for discovery, while limiting discovery to depositions and what is "necessary in the interest of justice"); § 316(a)(2) (authorizing standards for institution "under section 314(a)," which requires a "reasonable likelihood" merits showing). Unlike those provisions, for claim amendments, Congress gave the PTO general authority to set standards and procedures implementing § 316(d), without further qualification or restriction. This sweeping authorization cannot be reconciled with the notion that Congress understood § 316(e) to already dictate the standards and procedures for claim

amendments. Petitioner's interpretation of § 316(e) substantially invades the authority that Congress expressly granted to the PTO in § 316(a)(9).

3. Established Practices Governing Burdens of Proof Confirm the Reasonableness of the PTO's Interpretation

As is typical in court and administrative proceedings, for all motions, "[t]he moving party has the burden of proof to establish that is entitled to the requested relief." 37 C.F.R. § 42.20(c); *see also* C. Mueller & L. Kirkpatrick, Evidence § 3.1, p. 104 (3d ed. 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request[.]"). Placement of the burden on the patentee is also consistent with 5 U.S.C. § 556(d), under which in an adjudicatory proceeding under the APA the proponent of an order (here, an order that a patent be amended) has the burden of proof unless a statute provides otherwise. *See Dir. Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 276 (1994).

The PTO's rule for *inter partes* review is also consistent with long-standing interference practice, where amendments to claims also are made by motion. *See* MPEP § 2308.02. And the Federal Circuit has long held that placing the burden of proof on the moving party is permissible in the interference context. *See, e.g., Kubota v. Shibuya*, 999 F.2d 517, 521 (Fed. Cir. 1993). Congress's choice of the term "motion to amend" in § 316(d), rather than simply an "amendment," was thus made against a backdrop of the general rule that the proponent of a motion must show entitlement to the relief sought, and also of interference practice, where the party filing a motion

to amend is required to establish the patentability of the claim. For example, the relevant Board of Patent Appeals and Interferences[3] Standing Orders when the AIA was drafted and enacted provided that "if a claim is added to overcome a patentability problem raised in a motion, the motion to add the claim must explain why the proposed claim would overcome the problem." SO ¶ 208.5.1 (Mar. 8, 2011), (Jan. 3, 2006). The agency's choice of allocating the burden in the same way for similar motions in *inter partes* review is therefore eminently reasonable.

4. Petitioner Cannot Show that Placing the Burden on the Patent Challenger Comports With Congressional Intent

Section 316(e) does not require the PTO to use any particular burden of proof for motions to amend. For one thing, § 316(e) never mentions amended claims. Instead, § 316(e) applies only to claims that are "[i]n an *inter partes* review instituted under this chapter," making clear that the burden of proof is on the petitioner to prove unpatentable those issued claims that were actually challenged in the petition for review and for which the PTO instituted review. *See Nike*, 812 F.3d at 1334. Therefore, § 316(e) speaks only to the petitioner's burden of proving the unpatentability of existing claims; it does not specify who has the burden of proving the patentability of new, never-before-examined substitute claims.

Moreover, a motion to amend does not involve the petitioner's "proposition of unpatentability;" instead,

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[3] The Board of Patent Appeals and Interferences is the predecessor to the Patent Trial and Appeal Board, which was created by the AIA.

it involves the patentee's proposition of the patentability of the proffered claims. *See Nike*, 812 F.3d at 1334 (distinguishing the contexts of a petitioner proving unpatentability of a patented claim and a patentee proving patentability through a motion to amend). Section 316(d)(1) provides that, where a claim is not merely canceled, the patentee may "propose a reasonable number of substitute claims" in "1 motion to amend the patent." And § 318(a) distinguishes between "a patent claim challenged by the petitioner" and a "new claim added under section 316(d)" via the PTO's grant of a motion to amend. Placing the burden of proving such a proposition of patentability on the party filing the motion is consistent with the "ordinary default rule." *Schaffer ex Rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). Placing the burden on the patentee here is all the more appropriate given that the patentee is in the best position to understand how the prior art relates to its proposed substitute claims. *See Selma, Rome & Dalton R. Co. v. United States*, 139 U.S. 560, 568 (1891) ("[I]t has been established as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is more cognizant.").

F. Petitioner's Arguments Concerning the Use of the "Broadest Reasonable Interpretation Standard" Should be Rejected Out-of-Hand

First, the applicability of the "broadest reasonable interpretation" standard was already resolved in *Cuozzo*, 136 S. Ct. at 2416. Second, as discussed *supra*, Petitioner never raised this issue to the Federal Circuit. Third, as discussed *supra*, Petitioner fails to articulate why *Chevron* deference should not apply.

III. THE PTO'S DECISION FOLLOWED THE TRADITIONAL PRINCIPLES OF CLAIM CONSTRUCTION IN REJECTING PETITIONER'S PROPOSED CONSTRUCTION

Petitioner argues that the PTO's decision further warrants review because it evidences the "confusion" regarding the interaction of "traditional principles of interpretation with the broadest reasonable interpretation standard." Pet. at 27. Petitioner's argument is that the PTO failed to follow Federal Circuit law in rejecting its proposed construction for a single claim term: "second lockdown mechanism." More specifically, according to Petitioner, the PTO needs to adopt its narrow construction of the term because the '053 patent disparaged certain prior art devices. *Id.* at 30-31. Further, Petitioner argues that the Federal Circuit's Rule 36 affirmance of the PTO's decision shows that the Federal Circuit is "confused" in its interpretation of its own case law. *Id.* at 27. This argument fails because it ignores the thorough claim construction analysis and rejection of Petitioner's claim construction arguments in the PTO's decision.

In support of this argument, Petitioner relies on the Federal Circuit's decision in *PPC Broadband, Inc. v. Corning Optical Commc'ns RF, LLC*, 815 F.3d 747 (Fed. Cir. 2016). However, *PPC Broadband* stands for the unremarkable proposition that "the broadest reasonable interpretation must be *reasonable* in light of the claims and specification." *Id.* at 755. In that case, the Federal Circuit vacated and remanded the PTO's decision in an *inter partes* review because the PTO arrived at a particular construction by merely "referencing the dictionaries cited by the parties and simply selecting the broadest definition therein." *Id.* at 752. The Federal Circuit concluded that this

approach was impermissible because "it fail[ed] to account for how the claims themselves and the specification inform the ordinarily skilled artisan as to precisely which ordinary definition the patentee was using." *Id.*

Meanwhile, in the present case, the PTO expressly considered the specification and other claims in rejecting Petitioner's proposed constructions. Petitioner proposed the following construction for "second lockdown mechanism:" "a lockdown mechanism separate from a setting tool which locks the mandrel in position without hydraulic pressure." App., 12.

First, the PTO rejected the notion that "second lockdown mechanism" was limited to a mechanical (i.e., non-hydraulic) apparatus. The PTO found such an interpretation to be "untenable in light of the manner in which the term is used in the claims of the '053 patent" because "[i]nterpreting 'lockdown mechanism' to require a mechanical apparatus operating without hydraulic pressure would render the use of 'mechanical' to describe the lockdown mechanism in other claims superfluous" which violates the principle that "claims are interpreted with an eye toward giving effect to all terms in the claim" (one of the so-called traditional principles of claim construction). App., 15 (citing *Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 950 (Fed. Cir. 2006) (citations omitted)).

The PTO also found that such an interpretation was inconsistent with how "lockdown mechanism" is used in the specification because "the '053 patent describes the use of a hydraulic mechanism as a second lockdown mechanism." *Id.* at 16. In doing so, the PTO cited to particular passages of the '053 Patent. For example, the PTO stated that "[a]s the '053 patent explains, 'the mandrel [ ] is locked down in its

operative position by the hydraulic force [ ],'" and that "[t]he embodiment described further includes an additional mechanical feature 'to ensure that the mandrel is secured in the operative position.'" *Id.*

The PTO went on to reject the notion that the "second lockdown mechanism" must be an apparatus that is separate from the setting tool. The PTO noted that "setting tool:" "does not occur in any claim of the '053 patent," "is not expressly defined in the '053 patent" and "[t]o the extent any embodiment depicts an unclaimed feature described as a 'setting tool' as separate from the second lockdown mechanism, the claim language does not preclude that separate element from being incorporated into the second lockdown mechanism." *Id.* at 18. The PTO then concluded that "[w]e decline to import limitations from a preferred embodiment into the claim" (another traditional principle of claim construction). *Id.* (citing *Deere & Co.* v. *Bush Hog, LLC*, 703 F.3d 1349, 1354 (Fed. Cir. 2012)).[4]

Therefore, the PTO did not reject Petitioner's proposed construction without considering the specification, but rather issued a well-reasoned opinion that shows how Petitioner's proposed construction violates the traditional principles of claim construction. Indeed, Petitioner points to no decision that mandates the result it is seeking. Rather, Petitioner appears unwilling to concede that traditional principles of claim construction mandate the rejection of its proposed constructions.

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[4] The PTO noted that Petitioner's "argument that 'second lockdown mechanism' should be construed to be separate from the 'setting tool' was rejected in the related district court proceeding as 'not helpful because it introduces the unnecessary and ambiguous term 'setting tool.'" *Id.* at 17, n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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